

**Bandar Builder Sdn. Bhd. & 2 Ors. v.
United Malayan Banking Corporation Bhd.**

[1993] 4 CLJ

Mohamed Dzaiddin bin Hj. Abdullah SCJ

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BANDAR BUILDER SDN. BHD. & 2 ORS.

v.

UNITED MALAYAN BANKING CORPORATION BHD.

SUPREME COURT, IPOH
TUN DATO' SERI ABDUL HAMID
BIN OMAR LP,
DATO' MOHD. EUSOFF BIN CHIN SCJ,
DATUK MOHAMED DZAIDDIN BIN
HJ ABDULLAH SCJ
[CIVIL APPEAL NO. 03-86 OF 1992]
9 JULY 1993

PRACTICE & PROCEDURE: Application to strike out counterclaim and defence to counterclaim - Order 18 r. 19 Rules of the High Court 1980 - Principles applicable - Whether counterclaim and defence to counterclaim was obviously unsustainable - Whether counterclaim and defence to counterclaim have raised issues which merit serious consideration.

The respondent recalled banking facilities which had been granted to the first appellant, which facilities were guaranteed by the other appellants. The respondent commenced proceedings to recover the amount owing and the appellants counterclaimed alleging that the respondent had breached its duty of care in unreasonably delaying the granting of approval for the disposal of shares which had been pledged by the appellants as security for the granting of the facilities.

The respondent, in its reply, denied any such duty to liquidate the shares for the benefit of the appellants and sought to strike out the appellants counterclaim. The appellants sought to strike out the respondents reply and defence to counterclaim. The Registrar refused both applications and on appeal the learned Judge dismissed both the appeals. The parties appealed further.

Held:

[1] The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.

a **[2]** So long as the pleadings disclose some course of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

b **[3]** Having considered the counterclaim and the defence to counterclaim it could not be said that this was a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. Nor could it be said that the pleadings were frivolous, vexatious or that they may prejudice, embarrass or delay the fair trial of the action or that the pleadings were otherwise an abuse of the process of the Court.

[Appeals dismissed with costs].

[Bahasa Malaysia Translation of Headnote]

d ***AMALAN DAN PROSEDUR: Permohonan untuk membatalkan tuntutan balas dan pembelaan kepada tuntutan balas - A. 18, k. 19, Kaedah-Kaedah Mahkamah Tinggi 1980 - Prinsip-prinsip yang terpakai - Sama ada tuntutan balas dan pembelaan kepada tuntutan balas jelas tidak boleh dibenarkan - Sama ada tuntutan balas dan pembelaan kepada tuntutan balas telah menimbulkan isu-isu yang menghendaki pertimbangan serius.***

e Responden telah menarik balik kemudahan-kemudahan perbankan yang telah diberikan kepada perayu pertama, di mana kemudahan-kemudahan tersebut dijamin oleh perayu-perayu lain. Responden memulakan prosiding untuk mendapatkan balik jumlah wang yang terhutang dan para perayu menuntut balas dengan mendakwa bahawa responden telah melanggar kewajipan berjaga-jaga apabila dengan secara tidak wajar melengah-lengahkan pemberian kelulusan untuk melupuskan saham-saham yang telah dicagarkan oleh para perayu sebagai jaminan untuk pemberian kemudahan-kemudahan tersebut.

f Responden, dalam jawapannya, menafikan sebarang kewajipan yang sedemikian untuk mencairkan saham-saham tersebut bagi faedah para perayu dan memohon untuk membatalkan tuntutan balas para perayu. Para perayu memohon untuk membatalkan jawapan responden dan pembelaan kepada tuntutan balas. Pendaftar menolak kedua-dua permohonan tersebut dan atas rayuan Hakim

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yang bijaksana tersebut telah menolak kedua-dua rayuan tersebut. Pihak-pihak berkenaan membuat rayuan lanjutan.

Diputuskan:

[1] Prinsip-prinsip atas mana Mahkamah bertindak mengamalkan kuasanya di bawah mana-mana empat bahagian A. 18 k. 19(1), Kaedah-Kaedah Mahkamah Tinggi 1980 adalah bertapak dengan kukuhnya. Hanya dalam kes-kes biasa dan nyata sahaja yang proses terus boleh digunakan di bawah kaedah ini. Prosedur terus ini hanya boleh diterimapakai apabila jelas kelihatan bahawa sesuatu tuntutan atau jawapan yang berada di hadapan kes itu adalah jelas tidak boleh dibenarkan.

[2] Selagi plidingnya mendedahkan suatu cara tindakan atau membangkitkan soalan-soalan yang patut diputuskan oleh Hakim, kenyataan bahawa kes tersebut adalah lemah dan tidak akan berjaya diperbicaraannya bukan merupakan satu alasan untuk membatalkan plidingnya.

[3] Setelah menimbangkan tuntutan balas dan pembelaan kepada tuntutan balas tidak dapat diperkatakan bahawa ini adalah sebuah kes yang biasa dan nyata untuk membatalkan pliding kerana tidak mendedahkan sebarang kausa tindakan dan pembelaan yang wajar. Juga tidak boleh diperkatakan bahawa pliding berkenaan adalah remeh, menyusahkan atau bahawa ia boleh menjejaskan, memalukan atau melengah-lengahkan perbicaraan adil akan tindakan tersebut atau bahawa pliding berkenaan adalah suatu penyalahgunaan proses Mahkamah.

[Rayuan ditolak dengan kos].

Cases referred to:

Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor. [1967] 1 MLJ 87 (**refd**)
Midland Bank Trust v. Hett, Stubbs & Kemp [1979] 1 Ch. 384 (**refd**)
Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd. [1985] 1 CLJ 62/[1985] 1 MLJ 157 (**refd**)
National Society for the Distribution of Electricity by Secondary Generators v. Gibbs [1900] 2 Ch. 280 (**refd**)
China South Sea Bank Ltd. v. Tan Soon Gin @ George Tan [1900] 1 AC 536 (**refd**)
Malaysia Air Charter Sdn. Bhd. v. Standard Chartered Bank (Civil Appeal No. 02-259-1989) (unreported) (**refd**)
Hubbuck v. Wilkinson [1899] 1 QB 86 p. 91 (**refd**)

a Attorney-General of Duchy of Lancaster v. L. & N.W. Ry. Co. [1892] 3 Ch. 274, CA (**refd**)
Wenlock v. Moloney [1965] 1 WLR 1238; [1965] 2 All ER 871, CA (**refd**)
Moore v. Lawson [1915] 31 TLR 418 CA (**refd**)

Legislation referred to:

b Contracts Act 1950, ss. 125 - 130
 Rules of the High Court 1980, O. 18 r. 19(1), (a), (b), (c), (d), O. 33 r. 2

For the appellants - G. Sri Ram (P.S. Gill with him); M/s. Gill & Tang

For the respondent - Hira Singh (Asbir Kaur with him); Asbir, Hira Singh & Co.

JUDGMENT

Mohamed Dzaidin bin Hj Abdullah SCJ:

d These are two appeals against the decision of Shaik Daud J., given in chambers on 27 August 1992, on an appeal from the Registrar's decision, refusing to strike out the counterclaim and the reply and defence to counterclaim made pursuant to O. 18 r. 19 of the Rules of the High Court.

e Since we are concerned here with the question of striking out pleadings under O. 18 r. 19, we do not propose to go into the facts and documents in any more detail than is necessary. From the writ of summons and the statement of claim, it is clear to us that the respondent's claim against the appellants in this civil suit is for recovery of the amount due and owing under the various banking facilities as at 30 September 1988 with interest, granted by the respondent to the first appellant and guaranteed by the second and third appellants and one Kuah Sai Yok (deceased). The following facts are not in dispute. As at 16 July 1984, the following facilities were granted to the appellants:

- g* (a) a secured overdraft facility (OD) of RM750,000
- (b) a Letter of Credit facility (LC) of RM1.0 million;
- (c) a Trust Receipt facility (TR) of RM500,000; and
- (d) a Letter of Guarantee facility (LG) of RM3.5 million.

h The above facilities were secured by legal charges over several pieces of land and a duly executed Letter of Guarantee and Indemnity of the second and third defendants and Kuah Sai Yok (deceased) dated 10 September 1984. Originally, it was agreed between the parties that the

LG facility would be secured by personal guarantees of the second and third appellants and a counter-indemnity of an insurance company. Later, the parties agreed that the said LG facility be secured up to 50% of its value by legal charges over various pieces of land to secure RM530,000 and a fixed deposit of RM1,597,000. However, on 5 November 1985, the securities were varied, whereby the fixed deposit of RM1,597,000 was replaced with public-listed shares having a market value of approximately RM2.0 million. Consequently, on 7 May 1987, the respondent recalled the OD and TR facilities. It is also common ground that between 13 May 1987 and 9 August 1988, there were exchange of communications between the parties for the respondent to dispose of the shares pledged as settlement of the appellants' liabilities.

From the pleadings, we note that the respondent filed the present action on 24 November 1988, and on 9 January 1989, the appellants filed their defence, which was amended on 5 March 1990 to include the counterclaim. On 30 June 1990, the respondent filed their reply and defence to counterclaim. Finally, on 5 November 1990, the appellants, pursuant to an order of Court of even date, filed a further amended defence and counterclaim. In the further amended defence and counterclaim, the appellants stated that as a consequence of the respondent recalling the said facilities, the appellants on two occasions sought the respondent's permission to dispose all the said shares pledged with the respondent which, at the material time, was quoted at RM2.40 per share and therefore necessarily indicating that the sale of the said shares would fetch monies which would then be utilised to repay the OD and TR facilities. Prior to the appellant's second appeal for permission to sell the said shares, the respondent agreed to sell only RM1.75 million worth of the shares and they did not allow the first appellant to sell the balance of the said shares in order to repay the recalled facilities. The appellants therefore averred that the respondent, in breach of their duty of care, unreasonably delayed the granting of the approval for the disposal of the said shares until some five months after the share market crashed in October 1987, resulting in the said shares being dropped in value. By their counterclaim, the appellants repeated these allegations and averred that as a direct and foreseeable

a consequence of the respondent's failure to promptly approve the sale of the shares and in breach of their duty of care in failing to sell the said shares, they had caused the appellants to suffer loss and damage in not being able to dispose of the entire shares at a price which would have resulted in gross receipts which would be more than sufficient to repay the banking facilities. The first appellant would have had an additional RM1,880,561.07. Further, the appellants averred that as a result of the respondent's negligence, they had suffered loss in the form of interest and a further loss by way of interest charged by the respondent against the OD and TR facilities. Wherefore the appellants prayed for judgment in the sum of RM1,880,561.07 being the balance of proceeds of sale of shares after discharging their liability under the various banking facilities; interest; damages and costs.

d In the reply and defence to counterclaim, the respondent denied that they were under a duty in law to the first appellant to sell the shares or to allow the first appellant to sell the said shares as and when demanded by the company. They averred that upon the first appellant's application to the respondent to be allowed to dispose of shares pledged to them to secure the facilities, the respondent agreed by a letter dated 16 May 1987 to the disposal of a portion of the shares upon the terms and conditions stated therein. They alleged that in any event these terms and conditions were never met by the first appellant. The respondent further averred that it was a condition of the said banking facilities that these facilities were repayable on demand by them at any time. It was also a condition of the said facilities that a correct account was to be operated actively and satisfactorily and within the limit, and that payments of all bills must be prompt. The respondent maintained that the first appellant had failed to settle the overdue bills despite requests from them. Lastly, the respondent maintained that they were under no duty in law at all material times to allow the first appellant to liquidate the shares until the outstanding facilities had been repaid in full by the first appellant.

The next move taken by each side was to file their respective applications to strike out the pleadings. On 11 July 1990, the appellants filed their application to strike out the respondent's reply and defence to counterclaim and on 2

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November 1991, the respondent filed their application to strike out the counterclaim. Needless to say, their respective applications are supported by several affidavits.

Appellants' case

Before us, learned Counsel for the appellants submitted that the counterclaim of the appellants raised a fundamental issue, which is, whether the respondent was at all material times under a legal duty to immediately sell the shares pledged which was allegedly agreed between the parties on 27 March 1990 and to apply the proceeds of the sale to settle the liabilities of the appellants under the original agreement. Counsel stressed that as at 27 March 1990, there was a concluded agreement reached whereby the shares would be sold immediately. Thus, having agreed to sell these shares immediately, which was submitted to mean forthwith, it was not open to the respondent to claim that they had received no instructions from the pledger of the shares nor was it for them to deny that they had a duty to sell which duty arose from the agreement to sell. Wherever a relationship in contract exists, the duty of care arises (*Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 MLJ 87). In any event, Counsel submitted that the respondent owed the appellants a duty of care by reason of the relationship of pledgor and pledgee which was independent of any duty in contract, relying on *Midland Bank Trust v. Hett, Stubbs & Kemp*. [1979] 1 Ch. 384. Counsel also referred to ss. 125 to 130 of the Contracts Act on the law relating to pledge.

For the above reasons, Counsel respectfully submitted that the learned Judge erred in failing to consider the appellants' counterclaim separately, as it was a separate and independent action by the appellants against the respondent. Even though there were triable issues in respect of the respondent's main claim against the appellants, the Court could still exercise its powers under the Rule to strike out the defence to counterclaim of the respondent as it was shown that the respondent had failed to disclose a reasonable defence to the appellants' counterclaim (*Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd.* [1985] 1 MLJ 157).

With respect to the respondent's appeal from the Registrar's decision refusing to strike out the appellants' counterclaim, learned Counsel

a raised a preliminary point that this purported cross-appeal should have been commenced by the respondent filing a separate notice of appeal for that purpose. The respondent was not entitled by way of cross-appeal to attack the decision of the learned Judge. Counsel relied on *National Society for the Distribution of Electricity by Secondary Generators v. Gibbs* [1900] 2 Ch. 280.

Respondent's case

c In his written submissions, Counsel for the respondent stated that the triable issues which arose in these pleadings were as a result of the deposit by the second appellant and another person to the respondent of RM1,528,189 YTL shares, which the appellants alleged that the respondent's disposal of these shares was delayed by the respondent to the detriment of the appellants. Counsel pointed out that the appellants seemed to rely on the alleged agreement concluded on 27 March 1990. However, despite the pleadings having been amended on three occasions, the appellants had not pleaded the alleged agreement to sell these shares on 27 March 1990. The respondent, in the reply and defence to counterclaim, had not only denied the said agreement but also alleged that they were not under any duty of care to the appellants either to sell or allow the first appellant to dictate the terms of the sale until the total outstanding LG facilities were repaid in full because the respondent had not until the default any powers under the Memorandum of Deposit to dispose the said shares. In the circumstances, Counsel submitted that the issue of whether the respondent were at all material times under a duty in law to immediately sell the shares as allegedly agreed on 27 March 1990 and to apply the proceeds of sale towards repayment of the loan did not arise because this point was never pleaded in their pleadings. Counsel then referred to the correspondences exchanged between the parties. In the light of these letters, Counsel submitted that was never ever an agreement known to the law.

h Counsel further argued that the alleged causes of action as pleaded in the appellants' counterclaim were not known to law and therefore unsustainable. Counsel relied on *China South Sea Bank Ltd. v. Tan Soon Gin @ George Tan* [1900] 1 AC 536, where the Privy Council had held that the creditor owed no duty to the surety and that the bank could exercise its

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power of sale over the pledged securities and could decide in its own interest whether to sell and when to do so. According to Counsel, the case was followed by this Court in *Malaysia Air Charter Sdn. Bhd. v. Standard Chartered Bank* (Civil Appeal No. 02-259-1989) (unreported).

Thus, upon the facts and the several allegations pleaded in the respective pleadings of the parties, which we have highlighted above, can it be said that the counterclaim and the defence to counterclaim disclose no reasonable cause of action or defence, as the case may be, for this Court to exercise its power to strike out the pleadings under O. 18 r. 19(1)(a)? Secondly, based on the competing affidavits of the parties, can this Court exercise its power under the said Order or under its inherent jurisdiction to strike out the same pleadings on the grounds that they are frivolous or vexatious or may prejudice embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the Court under r. 19(1)(b), (c) or (d) of O. 18?

The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *para materia* with our O. 33 r. 2 Rules of the High Court) (*Hubbuck v. Wilkinson*) (*supra*). The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

After considering the counterclaim and the defence to counterclaim, we are satisfied that both pleadings have raised some issues which

- a* require serious discussion. The appellants alleged that the respondent owed them a legal duty of care which arose from an agreement to sell the public-quoted shares belonging to the appellants, and that as a result of unreasonable delay in granting the approval to sell, they have suffered loss and damage. The respondent, on the other hand, denied that a duty of care existed between them. Furthermore, there is also a dispute of fact concerning the alleged agreement on 27 March 1990. The respondent maintained that there was no concluded agreement reached between the parties on 27 March 1990. Here, the parties relied on the correspondences in the respective affidavits filed in the action. This Court as well as the Court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* [1915] 31 TLR 418 CA); (*Wenlock v. Moloney*) (*supra*).

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Bearing in mind the established principles stated above, we say that this is not a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. Nor can we say that they are frivolous, vexatious or may prejudice embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the Court. Accordingly, we dismiss both appeals with costs.

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